

AMERICAN OVERSIGHT OF AMERICA

Postmaster,

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
and UNITED STATES POSTAL SERVICE

Respondents.

Re: Petition for Enforcement of the
United States Court of Appeals
for the District of Columbia Circuit

JOINT PETITION FOR RESPONDENTS
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

ANTHONY G. HAYES
Council of Record
KAREN J. WARD
Of Counsel
O'DONNELL, SCHWARTZ &
ANTHONY
Suite 800
1504 L Street, N.W.
Washington, D.C. 20005
(202) 898-1797
Attorneys for Respondent
American Postal Workers
Union, AFL-CIO

QUESTIONS PRESENTED

1. Whether the respondent unions had standing to bring a civil action seeking judicial review of the final rule promulgated by the United States Postal Service suspending the Private Express Statutes so as to permit the practice of international remailing.

2. Whether the court of appeals correctly held that the Postal Service's final rule suspending the Private Express Statutes for international remailing pursuant to 39 U.S.C. 601(b) was arbitrary and capricious because the Postal Service failed to consider the impact of the suspension on all postal patrons and failed to explain its reasons for rejecting several more narrowly defined suspension alternatives.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1416

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,
v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
and UNITED STATES POSTAL SERVICE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

JOINT BRIEF FOR RESPONDENTS
AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

STATEMENT¹

1. On August 20, 1986, respondent United States Postal Service ("Postal Service" or "USPS") published a final regulation suspending in part the Private Express Statutes, 18 U.S.C. 1693-1699, 1729; 39 U.S.C. 601-606 ("PES"). The PES establish the postal monopoly. The partial suspension in question is for the purpose of permitting a practice known as international remailing.

¹ Respondents accept the specification of the opinions below, jurisdiction, and statutory and regulatory provisions involved, as set forth in the brief submitted on behalf of respondent Postal Service ("USPS Br.").

39 C.F.R. 320.8 (1986), Pet. App. 19a-26a, 51 Fed. Reg. 29,636 (1986). The new international remail regulation permits private carriers to deliver mail originating in the United States directly to foreign postal systems, bypassing the Postal Service.

On November 25, 1987, the respondents, American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC") (hereafter "the Unions") brought this action for declaratory and injunctive relief challenging the regulation. APWU and NALC are national labor organizations representing more than 600,000 Postal Service employees whose employment opportunities would be adversely affected by the diversion of mail and revenue to private couriers permitted by the regulation. The crux of the Union's claim is that the suspension is contrary to the mandate of 39 U.S.C. 601(b) in that the administrative record failed to establish that "the public interest requires" a suspension of the PES for international remail.

The district court granted summary judgment for the Postal Service, holding that the Unions lack standing to bring the action and, further, that the Postal Service had not acted arbitrarily and capriciously or beyond statutory authority. The court of appeals reversed the district court on both issues and remanded the case to the Postal Service for further development of the administrative record.

2. The PES, reserving to the Postal Service a monopoly over the carriage of letters, date back at least to the Continental Congress. The statutes were enacted to ensure that the Post Office would have sufficient revenues to maintain universal service at uniform rates. *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 593 (1988) ("Regents"); *United States Postal Service Board of Governors, Statutes Restricting Private Carriage of Mail*

and *Their Administration*, Com. on Post Office and Civil Service Print No. 5, 93d Cong., 1st Sess. 5-7 (June 29, 1973) ("Governors' Report"). "[S]ince colonial times, the postal monopoly . . . has been regarded as the foundation of the country's postal system. Priest, *The History of the Postal Monopoly in the United States*, 18 J. of Law & Econ. 33 (1975) ("Hist."); see *Governors' Report* at 5-56. Private expresses were viewed by Congress in the nineteenth century as "selfish" and "predatory." Hist. at 65-66.²

3. The Postal Reorganization Act of 1970 ("PRA"), abolished the former cabinet-level Post Office Department and created the present Postal Service. The Postal Service, heretofore heavily subsidized, was required to be self-supporting, 39 U.S.C. 3621. See *National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 813 (1983); *Regents*, 485 U.S. at 594. Congress considered and rejected an amendment during the floor debate on the PRA

² It is important to note that at no point prior to the 1970 postal reorganization did Congress intentionally authorize the Post Office to *suspend* the monopoly. The suspension authority now codified at 39 U.S.C. 601(b) was originally enacted in 1864, Act of March 25, 1864, ch. 40 Section 7, 13 Stat. 37, twelve years after enactment of the predecessor statute to the present 39 U.S.C. 601(a) which allowed private carriage of mail on which postage has been paid. Act of August 31, 1852, ch. 113 Section 8, 10 Stat. 141. The legislative history of the 1864 statute indicates that its purpose was to allow the Postmaster General to halt abuses of the stamped letters exception by suspending *the exception*, not the postal monopoly. See *Cong. Globe*, 38th Cong., 1st Sess. 1243 (1864) (statement of Rep. Alley). Prof. Priest summarizes the legislative history of the predecessor statutes to 39 U.S.C. 601(b) as follows:

Congress intended to establish an exception to the monopoly for the convenience of certain mailers, but only under conditions such that the revenue of the Post Office would not be harmed. . . . The Postmaster General's suspension power was the power to refuse this convenience—to prohibit private carriage under these conditions. . . . [Hist. at 79 n.228.]

ACCA's International Remail Committee agreed with this conclusion in the administrative proceedings below. See Court of Appeals Appendix at 312-317.

that would have eliminated the Private Express Statutes and allowed competition with the Postal Service. See 116 Cong. Rec. 9516-9517 (1970) (statement of Rep. Crane); *id.* at 20479 (1970) (statement of Rep. Udall) (noting that "high-volume, low-cost mail, would be peeled off by the private carriers and the Government would be left with the unprofitable business.") Congress, accordingly, reenacted the PES as part of the PRA.

In addition, the PRA required the Board of Governors to report and make recommendations to the President and Congress within two years on the "modernization" of the PES, based on a congressional finding that "a complete study and thorough reevaluation" of the PES was required. Pub. L. 91-375, section 7, 84 Stat. 783. The Governors' Report issued in 1973 concluded that the PES should be continued but not expanded, and that they should be administered in a systematic way through a rule-making process. Governors' Report at 9-14. The Governors found that the monopoly was essential to achieve the statutory policy of self-sufficiency. *Id.* at 6-7. The Report also suggested that the Postal Service could invoke authority under 39 U.S.C. 601(b) to implement narrowly drawn suspensions of the monopoly, but only "where there is a definite public need for delivery service that is substantially faster than any generally available service which the Postal Service now provides." *Id.* at 11.

4. Following the issuance of the Governors' Report, the Postal Service promulgated regulations, *inter alia*, adopting "the rule-making provisions of the Administrative Procedure Act," 39 C.F.R. 310.7, and creating certain narrow suspension of the postal monopoly. See 39 C.F.R. 320. In October 1979, the Postal Service adopted a regulation pursuant to its authority under 39 U.S.C. 601(b) suspending the operation of the Private Express Statutes for extremely urgent letters. 44 Fed. Reg. 61,181 (1979). The suspension was narrowly drawn and

established two tests to determine whether a letter is extremely urgent—a "loss of value" test and a "cost" test.³

On the promulgation of the urgent letter suspension, private mail services began relying on the suspension to justify the practice of international remailing in which private firms carry letters addressed to destinations outside the United States and deposit those letters in the mail stream of foreign postal administrations. Believing that the practice represented "a misuse of the urgent letter suspension" (*see* USPS Br. at 3), the Postal Service asked the Department of Justice to enjoin the practice. When the Department refused, the Postal Service initiated a rule-making proceeding in October 1985 to modify the urgent letter suspension to confirm that the suspension did not cover the practice of international remailing. 50 Fed. Reg. 41,462-64 (1985).

In March 1986, after receiving comments primarily from remailers and other members of the business community opposing the proposed rule-making, the Postal Service abruptly changed its position on international remailing. The Chairman of the Postal Service's Board of Governors, John R. McKean, announced the initiation of a new rule-making proceeding to consider whether the public interest required the suspension of the Private Express Statutes to allow international remailing. McKean's announcement was part of a notice published on March 21, 1986 in the Federal Register withdrawing the October, 1985 proposed rule and announcing that a new rule-making proceeding would be initiated "as soon as a factual record is fully developed." 51 Fed. Reg. 9853 (1986).

³ Under the loss of value test, the letter must be delivered within a short, specified period of time after dispatch and the value of usefulness of the letter must be greatly diminished if not delivered within that period. The cost test is satisfied if the amount paid for private carriage is at least \$3.00 or twice the applicable U.S. postage for First-Class mail, whichever is the greater. 39 C.F.R. 320.6.

The Postal Service never developed such a factual record. In particular, the Service failed to analyze the effect of the loss of revenue resulting from the suspension on all other users of the mails. In both the June 17, 1986 notice of proposed rule-making and the notice published on August 20, 1986, announcing the final rule, the Postal Service acknowledged the lack of factual information in the record.⁴

The Service nonetheless concluded that the record "appears to demonstrate the existence of a public benefit to support the suspension" and, accordingly, published its final rule. 51 Fed. Reg. 29,636 (1986). This lawsuit followed.

SUMMARY OF ARGUMENT

1. The international remailing suspension is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701-706 ("APA"). The Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of agency action.'" *Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988). This presumption may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Id.*

In this instance, the government bases its contention that Congress intended to preclude review on section 410 (a) of the PRA. Section 410(a) provides, in pertinent part, that "no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [the APA], shall apply to the exercise of the powers of the Postal Service." The fairest reading of

⁴ See e.g., 51 Fed. Reg. 21,931 (1986) where the Service acknowledged the "anecdotal character" of tables charting relative delivery times, the "imprecision of the data" on the need for private international remail, and the fact that there was "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers"; *id.* at 29,636 (referring to failure "to obtain precise and detailed information").

these words is that the Postal Service is absolved from the APA *only* where the Service takes action which, but for the provisions of section 410(a), would have been covered by a law "dealing with" one of the enumerated subject matters: "contracts, property, works, officers, employees, budgets or funds." Postal Service actions under the Private Express Statutes are well outside the scope of the enumerated items of section 410.

The narrow reading of the APA exception that we suggest is supported by the specific legislative history of section 410(a) and reflects the basic themes of the legislative history of the PRA as a whole. Accordingly, it cannot be said that there is "clear and convincing evidence" of a congressional intent to preclude all judicial review under the APA.

Even if section 410 of the PRA renders the APA inapplicable, the Postal Service actions suspending the Private Express Statutes are subject to traditional "common law" or "non-statutory" review. The postal jurisdictional statutes, 39 U.S.C. 409 and 28 U.S.C. 1339, vest the federal courts with subject matter jurisdiction to entertain claims that the Service has violated the substantive provisions of the PRA or its own regulations, or that postal regulations are *ultra vires*. Case law demonstrates that the APA has not "supplanted" the common law, so that a holding that there is no APA review here does not mean that the Postal Service's action is totally unreviewable, as the government contends. Similarly, the cases provide no support for the government's contention that judicial review is available only upon a demonstration of the four factors in *Cort v. Ash*, 422 U.S. 66 (1975).

In any event, insofar as the Postal Service never argued in the lower courts that its purported exemption from the APA under section 410(a) precluded judicial review, and this question was not presented in ACCA's petition for writ of *certiorari*, the government is pre-

cluded from raising this issue for the first time in this Court. Since the APA is not jurisdictional, a defense based on exemption from the APA can be waived by the Postal Service. The Court should conduct its review of the questions presented in the *certiorari* petition—application of the zone of interests test and the merits—based on the assumption that the APA is applicable.

2. In *Clarke v. Securities Industry Association*, 479 U.S. 388, 395 (1982), the Court reaffirmed a test of standing which requires that “the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” That test is statute-specific, and “all indicators helpful in discerning [congressional] intent must be weighed.” *Id.* at 400. The test denies standing only where a plaintiff’s interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Id.* at 399. In assessing the Union’s standing to bring this action under section 601(b) of the PRA, the Court is “not limited to considering the statute under which [the Unions] sued, but may consider any provisions which help [the Court] understand Congress’ overall purposes in the [PRA].” *Id.* at 400. Here, there is no question that postal employees were among the specific beneficiaries of the PRA. That statute, which was “jointly developed, through the collective bargaining process”, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 57 (1970) (“H. Rep.”), completely reformed all aspects of postal organization, including employee and labor relations. The PRA was enacted as a complete statutory scheme, the parts of which cannot be viewed in isolation. A critical component of this legislative reform—indeed, the very foundation of the postal establishment—was the reenactment of the PES. The interests of the Unions in protecting the employment opportunities of their mem-

bers which would be endangered by unauthorized dissipation of the monopoly promotes, rather than frustrates, statutory policies in the overall statute, clearly indicating that Congress did not intend to preclude suits of this sort. *Clarke*, 479 U.S. at 398-399.

The foregoing also demonstrates that, even if this action is not viewed as one arising under the Administrative Procedure Act, the Unions meet the prudential rule of standing suggested in *Clarke*, which would grant standing to those “for whose *especial* benefit the statute was enacted.” *Id.* at 400 n.16.

3. The court of appeals correctly overturned the international remail suspension. 39 U.S.C. 601(b) permits the Service to suspend its monopoly if—but *only* if—“the public interest *requires* such suspension.” (emphasis added). The international remail suspension did not comply with this standard because, as the court of appeals found, a) the suspension was intended solely to benefit a single segment of the Service’s consuming public, i.e. businesses engaged in commerce overseas, and b) the Service failed to consider the impact of the suspension on postal rates and service to those mailers who would continue to use the Postal Service.

ARGUMENT

I. THE INTERNATIONAL REMAILING SUSPENSION IS SUBJECT TO JUDICIAL REVIEW

The government, but not petitioner ACCA, advances the extreme contention that all postal regulations are entirely unreviewable.⁵ According to the government, the Administrative Procedure Act ("APA") is inapplicable, and no other right of action is express or can be implied in the Postal Reorganization Act ("PRA"). USPS Br. at 9-12, 21-30. As discussed below (see pp. 25-27), the government's defense of non-reviewability is not properly before the Court because that defense was not advanced in the proceedings below and was not presented in the *certiorari* petition. We begin, however, by showing that the government's argument is without merit in any event.

A. The "Strong Presumption" In Favor Of Judicial Review

The Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of agency action.'" *Traynor v. Turnage*, 108 S.Ct. 1372, 1378 (1988) (citation omitted). *Traynor*—the most recent of this Court's cases explaining the nature of the presumption—involved the question whether the refusal of the Veterans' Administration to allow two recovered alcoholics extensions of time in which to use their veterans' educational benefits was subject to judicial review under the Rehabilitation Act of 1973, 29 U.S.C. 794.

⁵ ACCA obviously has a strong interest in preserving the right to challenge postal regulations affecting its members. Indeed, ACCA is the lead party in a case currently pending in the District of Delaware seeking to overturn an international mail rate. *Air Courier Conference of America/International Committee* Paragraph 1 of the complaint states:

This action arises under the Postal Reorganization Act of 1970, 84 Stat. 719, 39 U.S.C. § 101 *et seq.* (the "Act"), as amended. Jurisdiction is based on § 409(a), as well as on 28 U.S.C. § 1339 (Postal Matters).

Precisely as here, the government argued that review was precluded, citing 38 U.S.C. 211(a) which explicitly bars judicial review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans." *Id.* at 1377.

The *Traynor* Court began its analysis by stressing that "clear and convincing evidence" of congressional intent is necessary to overcome the presumption in favor of judicial review:

The presumption in favor of judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent. . . . We look to such evidence as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" [108 S. Ct. at 1378 (citations omitted)].

The Court then concluded that the prohibitions of section 211 are "aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. *Id.* at 1379 (emphasis in original, citing *Johnson v. Robison*, 415 U.S. 361 (1974)).

Accordingly, the Court held that "[t]he text and legislative history of § 211(a) . . . provide no clear and convincing evidence of any congressional intent to preclude a suit" under the Rehabilitation Act. *Id.* See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent"); *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778-780 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984).

In this instance, the government bases its contention that Congress intended to preclude review on section 410 (a) of the PRA. As we now show, here, as in *Traynor*, neither the literal statutory language nor its legislative history, provide the *requisite clear and convincing evidence* of a congressional intent to bar judicial review of the Postal Service's administration of the Private Express Statutes.

B. APA Review

The starting point is, of course, the language of the statute. *Fort Stewart Schools v. Federal Labor Relations Authority*, 58 U.S.L.W. 4624, 4625 (U.S. May 29, 1990). Section 410(a) reads:

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapter 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

One fair reading of these words—and we submit the fairest reading—is that Congress intended to absolve the Postal Service from the APA *only* where the Service takes action which, but for the provisions of section 410 (a), would have been covered by a law “dealing with” one of the enumerated subject matters: “contracts, property, works, officers, employees, budgets or funds.”⁶ See

⁶ For example, the Postal Service publishes, and regularly amends, regulations contained in a wide variety of manuals covering every phase of postal operations (e.g., the Postal Operations Manual, Administrative Support Manual, Employee and Labor Relations Manual, and Financial Management Manual). See 39 C.F.R. 211.2 (defining the regulations of the Postal Service and listing manuals). The exemption set forth in section 410(a) means that the Postal Service, in implementing these regulations, need not comply with federal laws including the rule-making and judicial review provisions of the APA.

National Retired Teachers Ass'n v. USPS, 430 F. Supp. 141, 147 (D.D.C. 1977), *aff'd on other grounds*, 593 F.2d 1360 (D.C. Cir. 1979). But see, e.g., *National Easter Seal Society v. USPS*, 656 F.2d 754, 766 (D.C. Cir. 1981).

Had Congress intended to exempt the Postal Service from the APA altogether—and not only to exempt the Service from the APA as to contract and related matters—the natural locution would have been the use of a conjunction such as “and none of” before the phrase “the provisions of chapters 5 and 7 of title 5,” not the connective “including.” For the latter denotes that what follows is “a discrete or subordinate part or item of a larger aggregate [or] group”. *Webster's Third International Dictionary of the English Language (Unabridged)* (1986) at 1143. This construction of the statutory words is supported by cases applying the principles of *noscitur a sociis* and *ejusdem generis* to analogous statutes.⁷

⁷ See, e.g., *Dole v. United Steelworkers of America*, 110 S.Ct. 929, 935 (1990) (“words grouped in a list should be given related meaning”, citing cases); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980). In *Harrison* the Court was asked to apply the rule of *ejusdem generis* to a provision of the Clean Air Act granting the federal courts of appeals, instead of the district courts, exclusive jurisdiction to review certain expressly specified actions of the Administrator of the Environmental Protection Agency “or any other final action of the Administrator under this Act . . . which is locally or regionally applicable. . . .” The respondents in *Harrison*—resisting the assertion of jurisdiction in the court of appeals—argued that the phrase “any other final action” should be limited to those final actions which are similar to the enumerated actions of the administrator previously specified in the statute. The majority rejected this construction on the ground that the rule of *ejusdem generis* applies only where there is uncertainty as to the meaning of the statutory language, and there was no uncertainty in the meaning of the relevant phrase. *Harrison*, 446 U.S. at 588.

Here, uncertainty as to the meaning of section 410(a) necessarily arises from the presumption of reviewability insofar as the construction proffered by the government would preclude judicial

Postal Service actions under the Private Express Statutes are, moreover, well outside the scope of the enumerated items of section 410. The enumerated items focus exclusively on the Postal Service's internal operations, i.e. on activities which are most like those of a private business, where efficiency and flexibility are of particular concern. By contrast, when the Service promulgates regulations implementing or suspending the Private Express Statutes, the Service is acting as a regulatory agency administering a public law by defining the rights and privileges of citizens and firms acting on their own and subject to both criminal and civil penalties; i.e. the Service is acting in an area in which the due process of law is a particular concern. See *Associated Third Class Mail Users v. USPS*, 600 F.2d 824, 826 n.5 (D.C. Cir.), cert. denied, 444 U.S. 837 (1979).

It is also very much to the point that the PRA's legislative history contains no indication that Congress contemplated that section 410 would generally exempt all Postal Service actions—including those outside the scope of the enumerated items—from judicial review under the APA. To the contrary, the APA is not even mentioned in the committee reports explaining the statutory language. Thus, the House Post Office and Civil Service Committee Report's section-by-section analysis of H.R. 17070 explains:

review altogether (rather than simply determine the proper forum as in *Harrison*). Cf. *id.* at 595-601 (Rehnquist, J., dissenting). Moreover, the use of the disjunctive article "or" in the Clean Air Act language construed in *Harrison* ("or any other final action") necessarily cuts against a linkage of the words at the end of the clause with the enumerated items which precede it. Here, the use of the word "including" in PRA Section 410(a) compels such linkage. See *F. W. Fitch Co. v. United States*, 323 U.S. 582, 585-6 (1945); see also *Smith v. Davis*, 323 U.S. 111, 116-7 (1944); *United States v. Salen*, 235 U.S. 237, 249 (1914); *United States v. Stever*, 222 U.S. 167, 174-5 (1911); *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 348-9 (1870).

Section 114¹⁸—Application of Other Laws.—This section excludes the operation of Federal laws dealing with Federal contracts, property, works, officers, employees or funds, except as provided in the title or in the bylaws of the Postal Service.

H.R. Rep. No. 1104; 91st Cong., 2d Sess. ("H. Rep.") at 26 (1970). Similarly, the Senate Post Office and Civil Service Committee Report on S. 3842⁹ explains Section 410 as follows:

The Board of Governors shall have broad authority and shall not, except as specified, be subject to Federal laws dealing with contracts, property, and civil service system, the Budget and Accounting Act of 1921, apportionment of funds, and other laws which in most instances apply to Government agencies and functions.

S. Rep. No. 912, 91st Cong., 2d Sess. 5 (1970) ("S. Rep.").

Nor did any committee or member of Congress so much as suggest that section 410 constituted a blanket waiver of the APA. To the contrary, on the floor of the Senate, Senator McGee—the chairman of the Post Office and Civil Service Committee that reported the bill—characterized the laws which the bill made inapplicable to the Postal Service as those "relating to public works, contracts, employment, appropriations, budgeting, and any other laws governing agency operations". 116 Cong. Rec. 21,709 (1970). This statement directly supports the

¹⁸ The provision which is now Section 410 appeared in H.R. 17070 as Section 114.

⁹ S. 3842 amended H.R. 17070 by striking it in its entirety and substituting the Senate version. The Conference Committee accepted this, with amendments. H.R. Rep. No. 1363, 91st Cong., 2d Sess. 1, 79 (1970). The Conference Committee adopted the Senate version of the PRA. The comments of the managers on the part of the House included in the conference Report do not list the two formulations among those which are substantively different. *Id.* at 79.

proposition that PRA section 410(a) deals only with laws governing *internal agency operations*—i.e. the enumerated subjects—and the APA is inapplicable only with respect to administrative actions on those subjects.¹⁰

Beyond the specific references to section 410, the narrower reading of the APA exception that we suggest reflects the basic themes of the legislative history. As discussed more fully below (see pp. 30-39), a basic objective of postal reorganization was to “[e]liminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are . . . inconsistent with modern management and business practices”. H. Rep. at 2. This objective is obviously furthered by allowing the Postal Service flexibility in administering its contracts, property, workers, officers, employees, budgets, and funds. As we noted above, that is precisely what section 410 fairly read ac-

¹⁰ The origins of the PRA also support our suggested interpretation. As discussed below, the proposals that eventually resulted in the reorganization of the Post Office originated in the 1968 Report of the President's Commission on Postal Organization, entitled *Towards Postal Excellence* (1968) (“Kappel Report”). The report, while recommending exemption of the Postal Service from certain federal laws like personnel statutes, recognized the need to subject the Service to others, such as equal employment and conflict of interest laws, and the Hatch Act. Kappel Report, at 80-81. No mention is made of a blanket exception from the APA. In addition, the Commission's compilation of laws affecting postal operation characterized Title 5 as “generally cover[ing] employment.” *Id.* Annex vol. IV, at 7.73. The APA is not mentioned in the study.

We recognize that our analysis of the text and legislative history of PRA section 410 was rejected by the D.C. Circuit in *National Easter Seal Society v. USPS*, 656 F.2d at 766-8, and that other lower courts have held that section 410 exempts the Postal Service from the APA (although those courts have also recognized the availability of non-APA review under the postal jurisdictional statutes; see p. 19, n.13 *infra*). For the reasons stated above we submit that this conclusion is erroneous and should be rejected by the Court. *Cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

complishes. This rationale, however, does *not* justify an APA exemption for the Postal Service's actions having the force and effect of positive law under the Private Express Statutes.

Indeed, the government's claim that section 410 “is a clear signal of Congress' belief that an alleged violation of federal law should be enforced through the political process, and not through the courts at the behest of private parties,” (USPS Br. at 23), is directly contrary to express congressional intent. One of the primary purposes of the PRA was to free the Postal Service from “partisan political pressure” by insulating the Postal Service “from direct control by the President, the Bureau of the Budget and the Congress.” See Message from the President of the United States, 116 Cong. Rec. 12,203 (1970); see also S. Rep. at 8 (“The Committee simply, and hopefully, recommends that politics in the Post Office be abolished and authorizes the postal service to insure the fulfillment of that policy.”); 116 Cong. Rec. 27,599 (1970) (remarks of Rep. Ford).

In sum, the weight of the evidence strongly indicates that Congress had a limited purpose in enacting section 410(a). Plainly—in light of the statutory text and the foregoing—it *cannot* be said that there is “clear and convincing evidence” of a congressional intent to preclude *all* judicial review under the APA. This conclusion is further buttressed by established rules of construction governing APA coverage. Section 559 of the APA provides that “[s]ubsequent statutes may not be held to supersede or modify this chapter [i.e. chapter 5] [or] chapter 7 . . . except to the extent that it does so expressly.” 5 U.S.C. 559 (emphasis added).¹¹ Consistent

¹¹ In this connection, it is noteworthy that section 6 of the PRA amends various federal statutes, including provisions of Title 5 of the United States Code. The amendments excluded the new Postal Service from the list of “Executive departments” provided by 5 U.S.C. 101 and the definition of executive branch “independ-

with the presumption of review, the Court has held that section 559 makes APA Chapter 7 applicable in any case where there is doubt or ambiguity about the issue. See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955) (ambiguity in the word "final" in the 1952 Immigration and Nationality Act subjects deportation orders to the APA); see also *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962). Section 410 of the PRA does not clearly and unambiguously exempt from the APA Postal Service activities outside the enumerated items. Accordingly, Section 559 of the APA makes chapter 7 applicable here.¹²

ent establishments" provided by 5 U.S.C. 104. See Pub. L. 91-375, Sec. 6(c). However, the technical amendments did not amend 5 U.S.C. 701(b)(1), listing those government entities that are subject to judicial review under the APA. This is another indication that what Congress intended in enacting section 410(a) was a partial exemption of the Postal Service from the APA, confined to the enumerated items, rather than a blanket prohibition of judicial review.

¹² As the court of appeals below observed, the Postal Service's regulations make the APA applicable to the Service's administration of the Private Express statutes so that "the APA provides the appropriate standards for evaluating the procedural and substantive issues in this case." 891 F.2d at 307. 39 C.F.R. 310.7 provides that:

Amendments of the regulations in this part and in part 320 [governing suspensions] may be made only in accordance with the rulemaking provisions of the Administrative Procedure Act.

PRA section 410(a) expressly permits the Postal Service to continue in force laws that would otherwise be inapplicable "as rules or regulations of the Postal Service". Congress thus granted the Postal Service the right to promulgate rules with the force of law imposing statutory requirements on itself.

The government would blunt the force of 39 C.F.R. 310.7 by the "interpretation" that the section encompasses only the notice and comment provisions of APA chapter 5 and not the judicial review provisions of chapter 7. But the language of the regulation is not limited to chapter 5. In fact, the regulation has been interpreted by the Postal Rate Commission as giving rise to judicial review under the APA. See Statement of General Policy Determining

C. Non-APA Review

Even if section 410 of the PRA renders the APA inapplicable, the Postal Service actions suspending the Private Express Statutes are subject to traditional "common law" or "non-statutory" review. The postal jurisdictional statutes, 39 U.S.C. 409 and 28 U.S.C. 1339, vest the federal courts with subject-matter jurisdiction, respectively, "over all actions brought by or against the Postal Service" and over "any civil action arising under any Act of Congress relating to the Postal Service." Lower courts—including those who have ruled that APA review is unavailable by reason of section 410 of the PRA—have relied on these jurisdictional statutes to entertain claims that the Service has violated the substantive provisions of the PRA or its own regulations, or that postal regulations are *ultra vires*.¹³

Lack of Jurisdiction and Order Terminating Proceedings, *Regulations Implementing the Private Express Statutes*, Docket No. RM76-4, Order No. 133 (1976) at 24 (amendments to the private express regulations are "subject to judicial review under 5 U.S.C. §§ 701-706", citing 39 C.F.R. 310.7).

Indeed, the Postal Service has never previously argued that APA review of its actions under the PES is precluded. See *Associated Third Class Mail Users v. USPS*, 440 F. Supp. 1211, 1213 (D.D.C. 1977), *aff'd*, 600 F.2d 824 (D.C. Cir.), *cert. denied*, 444 U.S. 837 (1979), and discussion below at n.13. Accordingly, while we need not press the point, we would suggest that this is one instance where an agency's proffered interpretation of its own regulation is wrong. Cf. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987) (stressing consistency of administrative interpretation).

¹³ See *Combined Communications v. USPS*, 891 F.2d 1221, 1227-28 (6th Cir. 1989) ("a federal district court has jurisdiction under 28 U.S.C. § 1339, 39 U.S.C. § 409(a) and the 'well-established, common-law presumption favoring judicial review of administrative action' . . . to entertain the question of whether a final Postal Service regulation is *ultra vires*"); *Peoples Gas, Light and Coke Co. v. USPS*, 658 F.2d 1182, 1191 (7th Cir. 1981) (the Postal Service's "exemption from the provisions of the Administrative Procedure Act does not negate the applicability of common law review principles We conclude that the exemptions found in section 410 of the Postal Reorganization Act do not manifest a congressional

These decisions, endorsing the availability of non-APA or common law review in suits brought under the postal jurisdictional statutes, are firmly rooted in this Court's precedents. Before the APA was enacted in 1946, the Court allowed suits to be brought at common law challenging actions taken by the Postmaster General in the absence of any statutory provision expressly providing for such review. See *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 412-13 (1921). See also *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.").

intent to foreclose all judicial review of alleged violations [of] the Postal Service's . . . regulations."); *National Ass'n of Postal Supervisors v. USPS*, 602 F.2d 420, 429 (D.C. Cir. 1979) (postal jurisdictional statute "triggers the well-established presumption favoring judicial oversight of administrative activities").

See also *Jordan v. Bolger*, 522 F.Supp. 1197, 1201-02 (N.D. Miss. 1981) ("Despite the inapplicability of the APA, most federal courts have held that postal service employees are nonetheless entitled to nonstatutory judicial review of agency determinations."), *aff'd*, 685 F.2d 1384 (5th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *Burns v. USPS*, 380 F. Supp. 623, 626 (S.D.N.Y. 1974) ("The fact that the APA is not applicable . . . does not indicate a congressional desire to foreclose judicial review"); *Withers v. USPS*, 417 F.Supp. 1, 3 (W.D. Mo. 1976).

In a number of cases the Postal Service did not even challenge the reviewability of its actions. For example, in *Associated Third Class Mail Users*, the plaintiff mailers brought suit under sections 409 and 1339 claiming that the Postal Service private express regulations improperly expanded the scope of the postal monopoly through its definition of the term "letter." 440 F. Supp. at 1213. The Postal Service never claimed that the regulation was not subject to judicial review; it simply defended the regulation on the merits. See also *Owen v. Mulligan*, 640 F.2d 1130, 1134 n. 10 (9th Cir. 1981) ("At oral argument [Postal Service] counsel conceded that if the suit is characterized as one requiring the Postal Service to follow its own regulations, there is jurisdiction.")

The government claims that the APA has "supplanted" the common law and that a holding that there is no APA review here must mean that the action is totally unreviewable. (USPS Br. at 22-23). As we understand it, the argument is that the doctrine of common law or non-statutory review is dead, and has been since 1946.¹⁴ The authorities, however, show that the doctrine is very much alive.

As the Court held in *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35-6 (1983):

It is a well-established principle of statutory construction that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."

See also *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"); *Continental Management, Inc. v. United States*, 527 F.2d 613, 620 (Ct. Cl. 1975) ("common law rights and reme-

¹⁴ The government relies solely on two lower court decisions, *Cousins v. Secretary of DOT*, 880 F.2d 603, 606 (1st Cir. 1989), and *NAACP v. Secretary of HUD*, 817 F.2d 149, 152-53 (1st Cir. 1987), and legislative history of the APA establishing that the APA was designed to provide "a uniform method and scope of judicial review" and to "cover a broad spectrum of administrative actions" to support its argument that the APA "exhausts the field." USPS Br. at 22-23. However, the cases and legislative history cited merely establish that if the APA applies, Congress intended that the statute govern. For example, the court in *Cousins* found that "the APA not only should, but does, offer Cousins the type of review he seeks" and that it was "preferable" to call the lawsuit "a request for APA review, and not an exercise of an implied private right of action." 880 F.2d at 605. Likewise in *NAACP*, the court applied the provisions of the APA and rejected an attempt to invoke the private right of action doctrine. *NAACP*, 817 F.2d at 153.

dies survive, unless Congress intended the legislative provision to be "exclusive.").

The Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), after reviewing the legislative history of the APA, found that the Act served to "reinforce" pre-existing common law review:

Early cases in which this type of judicial review was entertained . . . have been *reinforced* by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). (Emphasis added).

Not surprisingly, then, the general understanding is that "common law" or "nonstatutory" review continues to be available. See Albert, *Standing to Challenge Administrative Action*, 83 Yale L.J. 425, 456-64 (1974), Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases*, 68 Mich. L. Rev. 867, 870 nn. 12-13, 913-14 (1970).¹⁵

For example, in *International Union, UAW v. Brock*, 477 U.S. 274 (1986), the Court allowed a direct challenge by a union, with no mention of the APA, of the Secretary of Labor's interpretation of the Trade Act since "there is no indication that Congress intended [the statute] to deprive federal district courts of subject-matter

¹⁵ See also Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administration Action*, 81 Harv. L. Rev. 308 (1967). Professor Davis states without equivocation: "the law of reviewability is in all major respects the same as it would be without the APA." 7 K. Davis, *Administrative Law Treatise* § 28:1 at 256 (2d ed. 1984) (emphasis omitted).

jurisdiction" and "claims that a program is being operated in contravention of federal statute . . . can . . . be brought in federal court." *Id.* at 285. Likewise, in *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court allowed a lawsuit brought by a union challenging the NLRB's decision to include professional employees in a unit with non-professional employees without their consent. This suit was brought not under the APA but directly under section 9(b)(1) of the NLRA "which commands that the Board 'shall not' do so." *Id.* at 186. The Court found that a cause of action shall be inferred from the "clear and mandatory" "shall" language of section 9(b)(1) in order to prevent

"a sacrifice or obliteration of a right which Congress" has given. . . . This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. [*Id.* at 190.]

See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. at 673 (referring to "review under the grant of general federal-question jurisdiction found in 28 U.S.C. § 1331," not the APA); *Harmon v. Brucker*, 355 U.S. 579, 581-82, 585 n.5 (1958) (relying on pre-APA cases for the proposition that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers," even where underlying statute expressly provides that "[a]ll functions performed under this title . . . shall be excluded from the operation of the Administrative Procedure Act"); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962); *Reilly v. Pinkus*, 338 U.S. 269 (1949).¹⁶

¹⁶ In addition to the postal cases cited in note 13, *supra*, lower courts have also held that an exemption from the APA does not bar common law review in cases arising under statutes other than the PRA. See *San Juan Legal Serv., Inc. v. Legal Serv. Corp.*, 655 F.2d 434, 438 (1st Cir. 1981) (finding judicial review where statute silent as to review and APA not applicable since silence "does not indicate a legislative intent to preclude judicial review" and pre-

Significantly, no case has held that non-APA judicial review is available only upon a demonstration of the four factors in *Cort v. Ash*, 422 U.S. 66 (1975), as the government now argues. USPS Br. at 21. This argument basically confuses a private cause of action with the right of judicial review.¹⁷ The former permits a private party *directly* to enforce statutory provisions; the latter simply submits to the courts the contention that the agency entrusted with enforcing a given statute has misinterpreted it. Understandably the law makes the burden of demonstrating a private cause of action a much more demanding one than that governing reviewability, which is presumed to be available. Private causes of action are disfavored, not presumed to exist, because the duty of enforcing public law belongs primarily to the government. By contrast, the right of review is implicit in every statute unless a congressional intent to deny it is shown by "clear and convincing evidence." *Community Nutrition*, 467 U.S. at 350, quoting *Abbott Laboratories v. Gardner*, 387 U.S. at 141.¹⁸

clusion of judicial review "is not lightly to be inferred"); *Spokane County Legal Serv. v. Legal Serv. Corp.*, 614 F.2d 662, 669 & n.11 (9th Cir. 1980) (since APA not applicable, court applied rule "which the Supreme Court fashioned for judicial review of administrative decisions before the advent of the APA" which has "no discernible difference [from] the 'arbitrary and capricious' standard"); *Szostak v. Railroad Retirement Bd.*, 370 F.2d 253, 255 (2d Cir. 1966) (exclusion from the APA "would not preclude review for abuse of discretion").

¹⁷ Again, while the government relies on *Cousins v. Secretary of DOT*, the *Cousins* court noted that "[t]he concept of an implied private right of action serves a useful legal purpose elsewhere in the law, when a plaintiff seeks to enforce a federal statute against a non-federal person." 880 F.2d at 606 (emphasis added). Accord *NAACP v. Secretary of HUD*, 817 F.2d at 152.

¹⁸ If there were a private cause of action available, the defendants would be private parties like ACCA or its members, whom the Unions would sue directly under the PES to enjoin their operations. See *American Postal Workers Union v. React Postal Serv., Inc.*, 771 F.2d 1375 (10th Cir. 1985) (finding a private cause of action

In sum, this action can clearly be brought using common law review principles as they have developed up until the present, even if the APA is found to be inapplicable.

D. The Government Has Waived The Defense That The APA Is Inapplicable

As noted above, the Postal Service never argued in the lower courts that its purported exemption from the APA under section 410(a) precluded judicial review.¹⁹ Similarly, this question was not presented in ACCA's petition for writ of *certiorari*. Accordingly, the government is precluded from raising this issue for the first time in this Court. See *Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Duignan v. United States*, 274 U.S. 195, 200 (1927); and Supreme Court Rule 14.1 (barring con-

under the PES). Accord *National Ass'n of Letter Carriers v. Independent Postal Systems of America, Inc.*, 470 F.2d 265 (10th Cir. 1972); contra *American Postal Workers Union, Detroit Local v. Independent Postal Systems of America, Inc.*, 481 F.2d 90 (6th Cir. 1973), *cert. dismissed*, 415 U.S. 901 (1974).

¹⁹ The government asserts that the unions' complaint "did not in fact rely upon the APA as a basis for their claim." (USPS Br. at 10). This simply is not true. Paragraph 19 of the complaint specifically alleged, as one of the Unions' "claims for relief", that "[t]he defendants actions, as described above, were: a) arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law; in excess of statutory jurisdiction, authority or limitations; and unwarranted by the facts within the meaning of 5 U.S.C. § 706". J.A. 110 (emphasis added). The complaint also alleged: "[W]hile the USPS is generally exempt from the provisions of the [APA] . . . it voluntarily follows APA procedures." J.A. 109. From our point of view—one in which the court of appeals concurred—it did not matter whether the APA supplied the applicable legal standard directly or through 39 C.F.R. 310.7 (adopting APA procedures); under either theory, the Postal Service failed to comply with the applicable APA standard. In any event, the adequacy of the complaint is not at issue. The government acknowledges that all parties "assumed that the APA applied to this case" (USPS Br. at 9 n.4) so that this case was litigated and decided as an APA case.

sideration of issues not presented, or fairly included, in the *certiorari* petition).

The government seeks to justify raising section 410 for the first time before this Court on the ground that its claim involves "congressional preclusion of judicial review" which is asserted to be "in effect jurisdictional." (USPS Br. at 9 n.4, citing *Block v. Community Nutrition Institute*, 467 U.S. at 353 n.4). This assertion is erroneous.

Section 410, at most, exempts the Postal Service from the APA. The judicial review provisions of the APA are not jurisdictional. *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Local 542, Int'l Union of Operating Eng'rs v. NLRB*, 328 F.2d 850, 854 (3d Cir. 1964), *cert. denied*, 379 U.S. 626 (1964); see also *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *General Inv. Co. v. New York Central R. Co.*, 271 U.S. 228, 230 (1926); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Since the APA is not jurisdictional, a defense based on exemption from the APA can be waived by the Postal Service. *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1013 (11th Cir. 1982); *Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1296-97 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989). See also *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) ("[t]he question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279, 281 (1977) (The defendant below had "failed to preserve the issue whether [the] complaint stated a claim upon which relief could be granted," and the Court was not required to resolve the issue because it was "not of the jurisdictional sort."); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 71 (1978).

Thus, since the APA exemption question is not jurisdictional, and because the Postal Service failed to preserve the issue below, the Court should conduct its review

of the questions presented in the *certiorari* petition—application of the zone of interest test and the merits—based on the assumption that the APA is applicable.

II. THE UNIONS HAVE STANDING

A. Postal Employees Are Within The Zone Of Interests Of The PRA

1. The test as explicated in *Clarke*

The court of appeals concluded (891 F.2d at 308)—and neither the government nor ACCA contests the conclusion—that the Unions meet the injury in fact requirement of Article III. The only standing issue in this case is whether the Unions' interest in protecting the employment opportunities of their members meets the "zone of interest" test. That test, as stated in this Court's most recent opinion focusing on this standing question, is whether "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1982), quoting *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).²⁰

²⁰ The zone of interest test was first articulated in *Data Processing*. It was, however, implicit in earlier cases, such as *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), with which the test is compared, and which is said to have been based on the necessity of a litigant to demonstrate a "legal interest" in the statute. See *Clarke*, 479 U.S. at 394. *Tennessee Electric* was a suit by competitors of the TVA to enjoin its operations as unconstitutional under the Fifth, Ninth, and Tenth Amendments. Because the company was alleging an unconstitutional deprivation of property under the Fifth Amendment, the Court required it to prove the existence of a property right to be free from competition, which, of course, it could not. 306 U.S. at 138. For example, the Court rejected the proposition that "the franchise to be a public utility corporation and to function as such, with incidental powers, is a species of property which is directly taken or injured by the Authority's competition." *Id.* at 138. As to the

It bears special emphasis that the answer to this question is *statute-specific*: "at bottom, the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. To be sure, in canvassing the statutory materials, the starting point is that Congress "inten[ds] to make agency action presumptively reviewable." *Id.* at 399. That being so, "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would be plaintiff." *Id.* at 399-400.²¹

Given the arguments made by ACCA and the government here, it is also critical to note that the inquiry concerns the entire statute, not just the particular section alleged to have been violated. As the Court stressed in *Clarke*, "we are not limited to considering the statute which respondents sued, but may consider any provision which helps us understand Congress' overall purposes in the National Bank Act." *Id.* at 401. The critical point here, as the *Clark* Court put it is this:

In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a

Ninth and Tenth Amendment claims, the Court held that only the states themselves could assert these rights. *Id.* at 144. This is but another way of saying that state-chartered public utilities were not within the zone of interests protected by the Ninth and Tenth Amendments. Thus, it is evident that the *Data Processing* Court was referring to the Fifth Amendment claim made in *Tennessee Electric* when it said that "[t]he 'legal interest' test goes to the merits." 397 U.S. at 153. This is because the legal interest test required the utilities to prove that they possessed a property right which was violated by the TVA even to raise the question whether they were deprived of their property without the due process of law.

²¹ Earlier, we noted that *Peoples Gas*, 658 F.2d at 1191, held that Postal Service regulations were reviewable. We note, however, that the Court of Appeals for the Seventh Circuit disapproved the standing aspects of *Peoples Gas* as too "restrictive" in light of *Clarke*. *City of Milwaukee v. Block*, 823 F.2d 1158, 1165 (7th Cir. 1987).

right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. [*Id.* at 399.]

We recognize that on this critical point both the government and ACCA invoke *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990). *Lujan* is cited in support of their argument that, to demonstrate their standing, the Unions have the burden of showing that they are within the zone of interests protected by section 601 of the PRA—the section the Postal Service is alleged to have violated—and not within the PRA's overall zone of interests. USPS Br. at 18, ACCA Br. at 17. That argument is doubly flawed. *Lujan* turned on the entirely separate issue not even contested here of whether the appellees were injured by the Secretary's failure to comply with certain environmental statutes, not whether their interests were comprehended within the zone of interests protected by those statutes generally.

Nonetheless in their zone of interests argument, the government and ACCA cite the emphasized part of the following passage from *Lujan*:

We have long since rejected that interpretation . . . which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather, we have said that to be "adversely affected or aggrieved . . . within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the zone of interests" sought to be protected by the statutory provision *whose violation forms the legal basis for his complaint*. See *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987). [110 S.Ct. at 3186 (concluding emphasis added).]

As we have already noted, the *Clarke* Court said plainly that, in the zone of interests analysis, the Court was "not

limited to the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act" at issue there. 479 U.S. at 401. And the foregoing quotation from *Lujan* makes it plain that the Court merely intended to give a shorthand description of the *Clarke* holding and did not overturn any aspect of *Clarke*. Given that point, the government's and ACCA's "argument focuses too narrowly on [PRA section 601], and does not adequately place [§ 601] in the overall context of the [PRA]." *Clarke*, 419 U.S. at 401.²²

With these principles in mind, we turn to an analysis of the PRA and its legislative history.

2. *The 1970 legislative consideration of the PRA and its special solicitude for postal employees and their unions*

The government's argument against Union standing rests on isolating the revenue-protective purposes of the PES from the overall Postal Reorganization Act, of which Section 601 is a part. USPS Br. 14-16. "But this argument is not faithful to the actual history." *Clarke*, 479 U.S. at 416 (Stevens, J., concurring). As the court of appeals below observed:

[T]o assess whether the Unions fall within the zone of interests of the PES we need not create nice distinctions between the PES and the PRA where Congress itself did not . . .

²² The USPS's and ACCA's comparison of the postal unions' interest in protecting the revenue of the Postal Service with the interest of the court reporter in having "on the record hearings" in the example cited by the Court in *Lujan*, 110 S. Ct. at 3186, is without merit. USPS Br. at 19-20, ACCA Br. at 19. While we have no reason to dispute the proposition Congress would most likely not consider the benefit to court reporters when enacting statutory provisions granting hearing rights and would certainly not rely on court reporters to enforce such hearing rights, in the next section we demonstrate clearly that Congress did consider the benefits of its actions to postal employees when enacting the PRA.

Unions asserted interest is embraced directly by the labor reform provisions of the PRA. The PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service. The interplay between the PES and the entire PRA persuades us that there is an "arguable" or "plausible" relationship between the purposes of the PES and the interests of the Union. [891 F.2d at 310.]

The PRA embodies congressional consideration of every aspect of postal organization and functioning. By the 1960's, the Post Office had deteriorated to a disastrous extent. See H. Rep. at 4-5; S. Rep. at 3. On April 8, 1967, the President created a Commission on Postal Organization, which came to be known as the Kappel Commission. In July 1968, the Commission submitted a report entitled "Toward Postal Excellence". The report found that "[t]he United States Post Office faces a crisis." *Id.* at 1. The report highlighted several categories of severe problems including "the circumstances of postal employment," *id.* at 14-16, and criticized "unproductive labor-management relations" between postal unions and supervisors. *Id.* at 18-22. The Commission recommended establishment of a government-owned corporation. The aim of such a corporation would be "the introduction of modern management practices" which would result in "not only greatly improved mail service, but the early elimination of the postal deficit, and . . . better career opportunities, and working conditions for the individual postal employee." *Id.* at iii.

The critical event leading to enactment to the PRA was the nationwide work stoppage by postal employees in March 1970.²³ See H. Rep. at 3. Congress recognized

²³ Prior to the strike, the need for reform in the Post Office was recognized by Congress to be a matter of great urgency. Hearings on postal reorganization were held in both houses throughout 1969. Members and witnesses warned of growing frustration among postal workers over pay and working conditions which could result in an

that this strike was the result of "legitimate grievances that had contributed to the cumulative frustration among postal employees Although it is one of the Nation's largest employers, the Post Office has an unsatisfactory record of labor-management relations. Career prospects are bleak, working conditions are frequently primitive, and morale is unacceptably low." H. Rep. at 3-4.

Although several bills to reform the Post Office had been introduced, the work stoppage "had the effect of crystallizing heretofore opposing and conflicting conferences in support of a new compromise postal reform proposal." H. Rep. at 3. Indeed, that compromise proposal, which became the PRA, was itself a product of negotiations between postal unions and the Nixon Administration. The Message from the President, dated April 16, 1970, explains that the Administration's bill²⁴ was "jointly sponsor[ed]" by the Post Office Department and the postal unions, pursuant to the strike settlement agreement. H.R. Doc. No. 313, 91st Cong., 2nd Sess. 1, *reprinted in* H. Rep. at 51. The memorandum of agreement between the Post Office Department and the postal unions expressly stated that "the parties have *jointly developed, through the collective bargaining process*, proposed legislation which provides for a major reorganization of the Post Office Department." H. Rep. at 57 (emphasis added).²⁵

illegal strike. See Postal Labor Relations and Employee Morale: Hearings Before the Subcomm. on Postal Operations and Civil Service, House of Representatives, 91st Cong., 1st Sess. 1, 65, 75, 98 (1969); Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. 782-83 (1969).

²⁴ The Administration's bill became S. 3842 and H.R. 17070. Although amended in committee, the reported bills embodied "a substantial number of the Administration's recommendations." S. Rep. at 1. See H. Rep. at 1-2 (purpose of H.R. 17070 was to carry out the President's Message of April 16, 1970).

²⁵ The agreement also promised amnesty for all strikers. *Id.* at 58.

President Nixon's message stated:

In the agreement, the Post Office Department and the postal employee organizations affiliated with the AFL-CIO undertook to negotiate and jointly sponsor a postal reorganization and pay bill to be recommended to the Congress as a measure that could ultimately lead to a cure of the problems that have been festering for years in the postal system.

The negotiations . . . have now culminated in agreement on a legislative proposal that would:

—Convert the Post Office Department into an independent establishment in the Executive Branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service.

—Provide a framework within which postal employees in all parts of the country can bargain collectively with postal management over pay and working conditions.

—Increase the pay of postal employees by 8 percent, over and above the Government-wide increase of 6 percent, and shorten the time required to reach the top pay step for most postal jobs. [*Id.* at 51.]

The proposed law was specifically intended "to allow postal workers to share the benefits of the increases in efficiency and productivity that should be attainable under a properly reorganized postal system." *Id.* at 54. The President recognized the obvious fact that attainment of the service objectives of the postal laws was inseparable from consideration of the welfare of postal employees. He said:

The Congress is now presented with an opportunity to pass legislation that will bring a new measure of fairness to postal employees, a new efficiency to the system itself, and long overdue equity to the taxpayer.

Neither better pay nor better organization will, in and of itself, guarantee better mail service.

Laws do not move the mail, nor do dollars. What moves the mail is people—people who have the will to excel, the will to do their work to the very best of their ability.

Enactment of the legislation that I now propose would give our postal employees the means to attain a goal they have never before had the means of attaining—the goal of building, in America, the best postal system in the world.

That is a goal worth striving for. With this postal reform legislation, it is a goal that can be achieved. I hope that Congress will lose no time in enacting the laws that are needed to let our postal people get on with the job. [*Id.* at 56.]

An enormous amount of preliminary work and debate had already been done by Congress before these bills were introduced. "The provisions of S. 3842 result from one of the longest and most intensive studies in the committee's history." S. Rep. at 1. The House Report stated: "Rarely has any subject received as much careful and intensive consideration by a committee of the Congress as this committee has given to the very complex and important subject of postal reform" H. Rep. at 2-3. The House Report summarized the statutory goals:

When enacted, H.R. 17070 will totally reform the Nation's postal system so as to—

Enable the postal service to continue to provide—and extend and improve upon—the present quality and scope of postal service in the face of the tremendous increases of mail volume that are expected in the future;

Eliminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent

with the modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service;

Modernize limitations on the authority of the postal service to procure transportation for mail so as to permit the most expeditious and economic movement of the mails, and thus facilitate more rapid and less expensive delivery, enable more economic utilization of the Nation's transportation resources, and encourage more responsive and imaginative development of new transportation facilities;

Create a lasting foundation for a modern, dynamic, and viable postal institution that is both equipped and empowered at all times to satisfy the postal requirements of the future technological, economic, cultural, and social growth of the Nation;

Provide postal employees with decent and modern working environments and with the facilities and modern equipment that they need in order to realize their full productive potential;

Improve postal employee-management relations, to recognize by law—that postal employees have the right freely to select collective bargaining representatives of their own choosing, and to give postal employees a voice in determining their conditions of employment and a real stake in the quality of the postal service that they provide to the public; and

Adjust the salaries of postal employees so as to compensate for the limited opportunities of career advancement that most postal workers have traditionally faced and to allow postal workers to share benefits of the improved efficiency and productivity that should be attainable under a properly organized postal system. [*Id.* at 2.]

The Senate Committee called the Act a "complete break with the past." S. Rep. at 2. See also 116 Cong. Rec.

27,604 (1970) (statement of Rep. Udall) ("[W]e are truly making a historic charge here today. A fundamental structure of American Government is abolished and a new Postal Service will take its place.").

Congress' recognition of the interests of postal employees is found throughout the PRA. The labor reforms of the PRA were among the essential means of achieving an efficient postal service. The Act specifically states as a postal policy that employees must be paid wages comparable to those in the private sector, and in particular mandates that the Service "place particular emphasis upon opportunities for career advancement of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States." 39 U.S.C. 101(c). Postal facilities were to be designed "to create desirable working conditions for its officers and employees." 39 U.S.C. 101(g). Representatives of employees, nominated by their unions, were given four (of 11) seats on the Postal Advisory Council, which the Service was required to consult with and receive advice from on "all aspects of postal operations." 39 U.S.C. 206. Chapter 10 established comprehensive, progressive employment policies, including maintenance of existing minimum standards. 39 U.S.C. 1005(f). Chapter 12 enacted a regime of collective bargaining based on the private sector model. Section 8 of the uncodified act preserved jobs of postal workers by transferring them to the Postal Service; section 9 legislated an 8% pay raise for all employees; section 10 required the negotiation of collective bargaining agreements meeting minimum standards; and section 13 directed immediate implementation of a merit system. PRA §§ 8-10, 13, 84 Stat. 783-786.²⁶

²⁶ Indeed, employment issues dominated the debates over the bills which culminated in the PRA. See, e.g., 116 Cong. Rec. 19,837-839; 20,200-241; 20,328-331; 20,432-501; 22,279-346; 23,525-528; 26,953-959 and 26,962-966 (1970).

But beyond those provisions dealing directly with labor issues, it was understood during the legislative process leading to enactment of the PRA that postal employees' interests—and thus the interests of the postal unions—were implicated in every aspect of the legislation. The agreement between the postal unions and the Nixon Administration "called for the parties to agree upon and jointly sponsor legislation designed to restructure the existing Post Office Department so that it might operate on a self-contained basis." H. Rep. at 3. Then-Postmaster General Winton M. Blount gave the following response to a question raised as to why postal unions had an interest in all aspects of the bill including the transportation provisions:

Mr. Corbett: Mr. Chairman, in that connection I am wondering why the postal unions or associations care about this particular section of the bill. Is there any reason for them to have concern about how you handle your transportation?

Mr. Blount: Mr. Corbett, both the postal unions and the Department have made it very clear that what they were doing was recommending to the Congress a complete postal reorganization measure. This recommendation involved the entire bill. We did discuss and talk about all the legislation. And certainly the employees of the Department are extremely interested in the manner in which we are able to handle our business, because they want to provide the best service to the American public that they can.

So our negotiations were in the matter of a recommendation to the Congress, and that recommendation included an entire legislative package.

Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 2d Sess. 35 (1970).

For precisely these reasons, the PES cannot be viewed as somehow distinct from the "entire legislative pack-

age."—The fact that the PES were reenacted as part of the PRA without substantial modification (see USPS Br. at 19) does not mean that the PES were not integral parts of the overall legislative enactment. The PES were reenacted only after Congress had given specific consideration to the need to maintain the Postal Service as a monopoly under the reorganization.²⁷ The PES were critical to the monopoly structure of the Postal Service, which was the "lasting foundation" upon which the reorganization was built. H. Rep. at 2; see Governors' Report at 6, 93. Indeed, because the PRA required the Postal Service, which had been heavily subsidized, to become financially self-sufficient, 39 U.S.C. 3621, see *Greeting Card Publishers*, 462 U.S. 813; *Regents*, 485 U.S. at 594, the PES became even more important to the finan-

²⁷ The Kappel Commission recommended retention of the PES, "although not necessarily in its present form" where they "do not seem to be adapted to the reality of modern communications." *Towards Postal Excellence* at 129. See *id.* Annex, vol. II, p. 6-5. Along with the rest of the PRA, "Congress concerned itself in detail with the Postal monopoly." PRC Order No. 133, at 17. See 116 Cong. Rec. 27596 (1970) (statement of Rep. Dulski). Before including language of the old PES in the PRA during the 1970 floor debate, Congress considered and rejected an amendment offered by Representative Crane during the 1970 floor debate that would have eliminated the PES. See *id.* at 9,516-517 (1976) (statement of Rep. Crane). Representative Udall spoke in opposition to the amendment, specifically noting the problem of cream-skimming. 116 Cong. Rec. 20479 (1970). See also *id.* at 26,954 (1970) (statement of Sen. McGee) *id.* at 26,954 (1970) (statement of Sen. Fong). In section 7 of the PRA, Congress ordered the Board of Governors to study whether to continue the PES in their current form and to report its findings within two years. Pub. L. 91-375, § 7, 84 Stat. 783. The Governors' Report concluded that the PES should be continued but not expanded, and that they should be administered in a systematic way through a rulemaking process. Governors' Report at 9-14. The Board of Governors also claimed the right under section 601 to suspend the PES when the public interest required it. *Id.* at 11. After the report issued, Congress held hearings on it. No statutory modifications resulted, and the monopoly stood as reenacted in the PRA.

cial viability of the new system. Governors' Report at 6-7. Obviously, then, failure properly to enforce the PES could, as a practical matter, deprive the postal unions of the essence of their legislative bargain.²⁸

Thus, unlike the banking laws considered in *Clarke*, the PRA is a single, unified statute which was enacted in its entirety at a single time. The PES were an integral part of that legislative package. And the Congress that enacted the PRA recognized that the postal unions' interests were bound up with every aspect of the PRA. In these circumstances, the court of appeals' finding of union standing is completely faithful to the overall "legislative spirit" of the PRA. *Clarke*, 479 U.S. at 414 (Stevens, J., concurring).

Far from being inconsistent with the objectives of the PRA (USPS Br. at 17), recognition of union standing here would simply permit a party, whose interests Congress recognized, to sue to vindicate norms established in the statute.²⁹ And those norms reflect interests that the PRA was designed to advance: the interests of preservation of the financial base of the Postal Service and protection of the employment opportunities of postal employees. The postal unions in this case are at the core of

²⁸ The memorandum of agreement specifically provided for the Postal Service "to generally be self-supporting by January 1, 1978." H. Rep. at 58.

²⁹ The government argues that the Unions' interest are incompatible with those of the PES because they always have an interest in challenging suspensions of the PES, even where the public interest requires it. USPS Br. at 17. However, nothing in *Clarke* suggests that an incentive to sue is a reason to deny standing. The Unions' incentive to sue is no different from bank competitors' incentive to sue whenever the Comptroller of the Currency permits national banks to expand their business in ways that threaten their profits through increased competition. In any event, the historical truth is that the Unions have not challenged other suspensions.

the "zone of interests" sought to be protected by the PRA.³⁰

B. Postal Employees Have Standing Under Non-APA Standards

We have shown, *supra* at 19, that if the agency action here were not reviewable under the APA, it would be

³⁰ The Postal Service is wide of the mark in suggesting that according the unions standing in this case would somehow lead to suits by employees against agencies whenever employees believe that "daily . . . decisions" threaten their employment opportunities. USPS Br. at 20. This case, of course, does not involve such daily personnel actions; this case deals with judicial review of an agency's final rule. From all that has been shown in the foregoing text—*viz.*, "the special emphasis which the PRA placed on the welfare of postal employees and the unique role of the PES in maintaining the financial viability of the Postal Service," 891 F.2d at 311—the Unions' interests clearly are *not* "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

And the court of appeals directly addressed the government's worry about opening a floodgate of litigation:

The Postal Service . . . is charged with the responsibility of preventing unwarranted dissipation of an historic postal monopoly. Congress has imposed an obligation, largely congruent with the interests of postal employees, that is much stronger than those embodied in most statutory schemes under which disgruntled agency employees might sue. [*Id.*]

In this regard, the court of appeals was careful to distinguish the kind of case as to which the Postal Service brief expresses concern: *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, *reh. denied*, 892 F.2d 98 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 3214 (1990), which denied standing to a federal employee union which challenged a decision to contract out work to private firms. The *Cheney* court held that the statutes there at issue did not provide standing to the union. Those statutes were intended to foster the contracting out of government work to private firms. *Id.* at 1050. This contrasts with the PES, which legislate *against* competition, and with the PRA, which recognizes the interests of postal employees—interests which are congruent with the PES's purposes. 891 F.2d at 311.

reviewable under common law principles. As we now show, the postal unions would have standing in the event that such non-APA review were found to govern this case.

In *Clarke* the Court withheld judgment on the question whether "the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." 479 U.S. at 400 n.16.³¹ The Court compared the zone test with the standards governing implied causes of action, which established a "threshold burden" on a plaintiff of showing that the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Id.*, quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original). Whatever test might apply in the range from "zone of interests" to "especial benefit," the Unions here would have standing.

We have already shown at length that the Unions here meet the "zone of interests" test. *See supra* at 27-40. That same showing would also meet the requirements of the "especial benefit" standard. As the President of the United States stated, the Unions here negotiated and "co-sponsored" the PRA as part of the resolution of a nationwide labor dispute. *See supra* at 31-34. The agreement provided for "restructur[ing]" that would allow the Postal Service to "operate on a self-contained basis." Congress

³¹ The zone test has been cited in both APA and non-APA cases. *Data Processing*, for example, expressly stated that the test applied to "constitutional guarantees." 397 U.S. at 153. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321, n.3 (1977) (applying the test to the Commerce Clause); *Tennessee Electric*, 306 U.S. at 144 (implicitly holding that utilities were not within the zone of interests of the Ninth and Tenth Amendments); *see also Valley Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 n.6 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976), where the test was mentioned.

was expressly informed by the Postmaster General that the postal unions had an interest in every part of the legislative package that constituted the PRA. And the PES were an integral part of that package. Due recognition of the process that produced the PRA requires that the Unions be recognized as "one of the class for whose *especial* benefit the statute was enacted."

III. THE COURT OF APPEALS CORRECTLY OVERTURNED THE INTERNATIONAL REMAIL SUSPENSION

PRA section 601(b) permits the Postal Service to suspend its monopoly if—but *only* if—"the public interest *requires*" such suspension (emphasis added). The court of appeals found that the suspension of the PES for international remailing was inconsistent with this public interest standard because the suspension was intended solely to benefit "a single segment of the Service's consuming public: businesses engaged in commerce overseas." 891 F.2d at 313. That court also concluded that the Postal Service had acted unreasonably in that the Service failed to consider "the impact of the proposed suspension on those customers who would continue to use the Postal Service, both from a price and service perspective." *Id.* Both these conclusions are correct and should now be affirmed.³²

A. The Suspension Was Inconsistent With the Public Intent Standard Provided by Section 601(b)

The public interest standard set forth in section 601(b) is not an open-ended grant of discretion.³³ "[T]he use

³² In addition, the court's conclusion that the USPS acted arbitrarily and capriciously by failing to explain its reasons for rejecting "more narrowly, defined suspension alternatives," 891 F.2d at 314, citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983), should also be affirmed.

³³ The government argues that section 601(b) does not define the term 'public interest', and it entrusts the public interest deter-

of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976).

The most authoritative statement of the purposes of the PES, in the context of the PRA, is the 1973 Governors' Report. The Report stressed that the postal monopoly is necessary to meet the PRA's goal of making the Postal Service "self-sufficient . . . in the face of cream-skimming competition against its major product" and therefore, strongly recommended that the monopoly be retained and that any exceptions to the monopoly be narrowly drawn. Governors' Report at 6. The Report further emphasized that suspension of the monopoly to aid "some members of the business community" would ultimately have a negative impact on the "larger business and general public community":

Relaxation could well serve some members of the business community whose primary financial interests are tied to letter mail. It would ill serve members of a larger business and general public community

mination to the judgment of the Postal Service. (USPS Br. at 28). However, this attempt to characterize section 601(b) as a broad grant of discretion ignores the fact that where Congress did choose to confer regulatory discretion on the Postal Service it used distinctly different statutory language. Section 401 of the PRA provides the USPS with the necessary powers to effectuate the purposes of the PRA, among them the power "to adopt, amend, and repeal such rules and regulations *as it deems necessary* to accomplish the objectives of this title." 39 U.S.C. 401(2) (emphasis added). No comparable language exists in section 601. The Postal Service's claim of broad discretion to suspend the PES would in effect substitute the rule-making language of section 401(2) for the significantly more narrow language used in section 601(b), and, thus, read the latter provision out of the Act. *See also* 39 U.S.C. 5001 (providing for temporary transportation arrangements "when, *as determined by the Postal Service*, an emergency arises") (emphasis added).

who depend on the Postal Service to serve all their mail needs.

Relaxation would also impose genuine hardships upon those people who live in thinly populated or low income areas, areas which private carriers might not serve and in which Postal Service capabilities would inevitably decline. [*Id.* at 9.]

When the Postal Service promulgated the urgent letter suspension, 39 C.F.R. 320.6, the Postal Service itself recognized that selective cost savings for individual mailers do not represent a legitimate justification for a suspension of the Private Express Statutes. The Postal Service's rationale for including a requirement that the cost of private carriers be higher than that of the Postal Service to qualify for the urgent letter suspension was to protect against having low cost cream-skimming competitors undermine the postal system and "effectively nullif[y]" the Private Express Statutes. As the Service stated in its Federal Register notice of proposed rule-making:

The test we have suggested is greater of three dollars or twice the applicable U.S. postage for first-class mail. *This is designed to protect the postal system against the inroads of "cream-skimming" by private couriers solely on the basis of their ability to undercut postal rates selectively.* It is intended to test whether the shipper looks to a private carrier because he genuinely attaches an importance to prompt delivery, or simply because he desires to reduce shipping costs selectively. *If selective cost savings were sufficient grounds to use a private courier to carry letters, the Private Express Statutes would be effectively nullified.*

44 Fed. Reg. 40,076 (1979) (emphasis added).

The Postal Service simply ignored the foregoing reasoning during the rule-making proceedings below, and

instead relied on comments that international remailers could provide lower cost service. See comments cited in USPS Br. at 32, n.14. However, the lower costs supposedly offered by the international remailers do not represent a benefit to the *overall mailing public*. Rather, the public ultimately must absorb, through higher postal rates, the net revenue loss to the Postal Service because of a suspension designed to benefit only a relatively small number of firms who mail to international destinations.³⁴

The argument offered in response to the foregoing by the government and ACCA is that the private couriers offer international mailers service that is faster, more flexible and more reliable, thus enhancing American competitiveness overseas. The fatal flaw in this argument—even assuming, *arguendo*, that private couriers are faster, more flexible, and more reliable than the Postal Service—is that prior to the international remail suspension, international mailers *already* had access to private couriers through the urgent letter exemption. The *only* real consequence of the remailing suspension was to release international remailers from the time and cost requirements of the urgent letter rule which remain applicable to all other mailers who wish to utilize private couriers. The record is devoid of any facts that justify according international remailers such favored treatment.

In sum, the international remail suspension cannot be characterized as satisfying the public interest standard of section 601(b).

³⁴ As was demonstrated by the declaration of economist Dr. Jack Rutner that was submitted below, J.A. 140-141, the Postal Service's own data show that the Service has suffered a net loss of revenue due to skimming of mail volume by international remailers.

B. The Postal Service Failed to Consider the Impact of Revenue Loss Caused By the Suspension

In *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. at 43, the Court observed that a regulation promulgated by an administrative agency will be overturned as arbitrary and capricious, *inter alia*, "if the agency has relied on factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem". Here, the Postal Service not only relied on an inappropriate factor (selective cost savings to businesses who mail abroad) but failed to consider a crucial aspect of any private express issue—the impact of the loss of revenue necessarily resulting from a suspension of the monopoly.

It is undisputed that the Postal Service was never able to forecast the revenue that would be lost due to the international remail suspension. Instead, the Service simply asserted that even if the amount would be diverted was equal to the total amount of revenue from international mail—\$882.3 million or 3.2% of total postal revenue—such loss would not outweigh the perceived benefits to the public interest. USPS Br. at 35. But, as the court of appeals correctly concluded, the Postal Service never attempted to assess the impact on postal rates and services that would result from an \$882.3 million loss of revenue. Since the Postal Service is required by statute to be economically self-sufficient, 39 U.S.C. 3621, these losses will ultimately have to be charged back to the overall mailing public in the form of higher postal rates, or, conceivably, reduced service. Having failed to give *any* consideration of these questions, the Postal Service cannot be said to have reasonably evaluated "the public interest" as required by section 601(b).³⁵

³⁵ The Postal Service has not always been so cavalier about the loss of revenue caused by suspensions of the Private Express Stat-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

KEITH E. SECULAR
Counsel of Record
SOPHIA E. DAVIS
COHEN, WEISS & SIMON
300 West 42nd Street
New York, NY 10036
(212) 563-4100
*Attorneys for Respondent
National Association of
Letter Carriers, AFL-CIO*

Of Counsel:
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5383

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ANTON G. HAJJAR
Counsel of Record
KAREN J. WARD
Of Counsel
O'DONNELL, SCHWARTZ &
ANDERSON
Suite 200
1300 L Street, N.W.
Washington, D.C. 20005
(202) 898-1707
*Attorneys for Respondent
American Postal Workers
Union, AFL-CIO*

utes. In a rule-making proceeding in 1973-74 which resulted in a revision of its private express regulations, the Postal Service considered a suspension for intra-company materials. It ultimately abandoned this proposal in part because:

[F]inancial conditions in the Postal Service today require that the most careful consideration be given to any proposal that might curtail postal revenues, particularly if the curtailment could be large and its control difficult. For these principal reasons, we have concluded that the Postal Service should not exercise its discretion to suspend the Private Express Statutes as to intra-company letters.

39 Fed. Reg. 33,211 (1974).